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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 979

ORLEANS PARISH SCHOOL BOARD,
Petitioner,

versus

EARL BENJAMIN BUSH, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Orleans Parish School Board, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on February 13, 1958.

CITATIONS TO OPINIONS BELOW.

The decree of the United States District Court for the Eastern District of Louisiana, Honorable J. Skelly Wright presiding, is reported in 138 Fed. Supp., 337 and is printed in Appendix "B" hereof, page 8. The order of the same court dismissing petitioner's motion to "vacate,

set aside and declare the preliminary injunction issued on February 15, 1956 to be null, void, and without effect" is a minute entry and appears on page 11 of the transcript. The opinion of the United States Court of Appeals for the Fifth Circuit, rendered and entered February 13, 1958 is as yet unreported and is printed in Appendix "B", page 10.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 13, 1958 (Tr. p. 18). Rehearing was denied on March 28, 1958 (Tr. p. 31). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED.

Can a preliminary injunction issue without the posting of security in accordance with Rule 65 (c) Federal Rules of Civil Procedure, 28 U.S.C.A., particularly when the Court in its decree required the posting of such bond?

STATUTES INVOLVED.

Federal Rules of Civil Procedure, Rule 65 (c) 28 U.S.C.A., requiring the giving of security as a prerequisite to issuance of a preliminary injunction is printed herein in Appendix "A" at page 7.

STATEMENT.

On February 15, 1956, the United States District Court for the Eastern District of Louisiana, entered a decree for a preliminary injunction against petitioner, Orleans Parish School Board, which said decree further or-

dered "that a bond be filed by plaintiffs in the sum of One Thousand and no/100 ($1,000.00) Dollars, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." (Tr. p. 7). Appeal was taken from this decree to the United States Court of Appeals for the Fifth Circuit which on March 1, 1957, entered its judgment sustaining the District Court. 242 Fed. (2d) 156. Application for Rehearing was denied. Thereafter Application for Writs of Certiorari were denied by this Court. 354 U. S. 921.

On June 14, 1957, sixteen months after entry of the decree, respondents having failed to post bond, petitioner filed a motion to "vacate, set aside and declare the preliminary injunction issued on February 15, 1956, to be null, void and without effect on the ground that respondents have failed to file the bond required by the decree of this court and by law." (Tr. p. 8). That motion was fixed for hearing before the District Court on June 26, 1957. Subsequent to the filing of said motion and subsequent to the service of the motion on respondents but prior to the hearing thereon, respondents on June 20, 1957, filed bond in the amount required by the decree of the Court. (Tr. p. 9).

On June 26, 1957, hearing was had on the motion to vacate the preliminary injunction and the court issued an order denying same, which order was entered on June 26, 1957. (Tr. p. 11).

On July 17, 1957, respondent filed an appeal with the United States Court of Appeals for the Fifth Circuit.

After the submission of briefs and oral argument, Circuit Judges Hutchinson, Tuttle and Jones on February 13, 1958 issued their opinion and entered judgment affirming the decision of the District Court. (Tr. p. 18). Thereafter on March 5, 1958, petitioner filed a petition for rehearing and submitted briefs thereon, which said application was denied on March 28, 1958.

REASONS FOR GRANTING WRIT.

The ruling of the United States Court of Appeals for the Fifth Circuit in sustaining the District Court's rejection of petitioner's motion to set aside and declare the preliminary injunction null and void for failure of respondent timely to comply with the sacramental requisite of posting bond required by law and by order of Court stands alone.

It is in direct conflict with rulings of the Courts of Appeal of the First, Third, Fourth and Seventh Circuits which have uniformly held the requisite bond in Rule 65 (c) and its predecessor, U.S.C.A. 28:382 to be obligatory and that the issuance of a preliminary injunction in violation thereof is void. See *Utah Radio Products Co., et al., v. Boudette, et al.*, 69 Fed. (2d) 973 (CCA 1, 1934); *Robinson v. Benbow*, 298 Fed. 561 (CCA 4, 1924); *Chatz v. Freeman, et al.*, 204 Fed. (2d) 764 (CCA 7, 1953); *Hopkins v. Wallin, et al.*, 179 Fed. (2d) 136 (CCA 3, 1949). But see *Urbain v. Knapp Brothers Manufacturing Co.*, 217 Fed. (2d) 810 (CCA 6, 1954), Cert. Den. 349 U. S. 930.

It is apparent from the above that the Courts of Appeal in the various circuits are in irreconcilable conflict with respect to the manner in which Rule 65 (c) of the

Federal Rules of Civil Procedure is to be applied, and the continued usefulness of Rule 65 (c) can only be secured by the decision of this Court.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GERARD A. RAULT,
American Bank Building,
New Orleans, Louisiana,
Attorney for Petitioner.

PROOF OF SERVICE.

I, GERARD A. RAULT, one of the attorneys for Orleans Parish School Board, petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On A. P. Tureaud, Esquire, and A. M. Trudeau, Jr., Esquire, Counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to their offices at 1821 Orleans Avenue, New Orleans, Louisiana;

2. On U. Simpson Tate, Esquire, Counsel for Respondents, by mailing a copy thereof, air mail

postage prepaid, addressed to his office at 2600 Flora Street, Dallas, Texas;

3. On Robert L. Carter, Esquire and Thurgood Marshall, Esquire, Counsel for Respondents, by mailing a copy thereof, air mail postage prepaid, addressed to their offices at 107 W. 43rd Street, New York 36, New York.

Dated this day of May, 1958.

GERARD A. RAULT,
Attorney for Petitioner,
American Bank Building,
New Orleans, Louisiana.

APPENDIX "A"

STATUTES INVOLVED

Federal Rules of Civil Procedure, Rule 65

INJUNCTIONS

* * * (c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. As amended Dec. 27, 1946, effective March 19, 1948.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Earl Benjamin Bush, et al.,
Plaintiffs,
versus
Orleans Parish School Board, et al.,
Defendants.

No. 3630
Civil Action

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Robert L. Carter
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Thurgood Marshall
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Browne & Rault
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Fred S. LeBlanc
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Attorneys for Defendants.

DECREE

This cause came on for hearing on motion of plaintiffs for a temporary injunction in accordance with the decree of the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U. S. 294, and the court, having carefully considered the decision of the Supreme Court, the arguments of counsel and the record heretofore made in this cause:

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Orleans Parish School Board, a corporation, and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka, supra.*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a bond be filed by plaintiffs herein in the sum of One Thousand Dollars ($1,000.00) for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained, said bond to be approved by the Clerk of this Court.

/s/ J. SKELLY WRIGHT,
UNITED STATES DISTRICT JUDGE.

New Orleans, Louisiana,
February 15, 1956.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,851

ORLEANS PARISH SCHOOL BOARD,
Appellant,

versus

EARL BENJAMIN BUSH, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(February 13, 1958.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This is a second appearance of this case here and the second attempt to have the court set aside a preliminary injunction entered on February 15, 1956, in favor of plaintiffs, Bush, et al., and against the defendant, Orleans Parish School Board, the sole ground for its reappearance after we affirmed the

trial court's order on the merits,[1] being the claim that the temporary injunction was void because the plaintiff failed to make the $1,000 bond that was required to be made in the court's injunction order until after affirmance of the injunction by this Court.

The temporary injunction which was issued by the trial court required no immediate affirmative action or cessation of action. It provided as follows:

> "IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Orleans Parish School Board, a corporation and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka, supra."

There then followed the paragraph relating to the bond:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a bond be filed by plaintiffs herein in the sum of One Thousand Dollars ($1,000.00) for the payment of such costs and damages as may be incurred or suffered by any party who is found

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[1] Orleans Parish School Board v. Bush, et al., 5 Cir., 242 F. (2d) 156, cert. den. 354 U. S. 921.

to be wrongfully enjoined or restrained, said bond to be approved by the Clerk of this Court."

The plaintiffs filed no bond immediately thereafter or at any time pending the appeal that was timely taken by the defendant school board. Neither on the appeal nor by motion in the district court did the Board take exception to the failure of the plaintiff to make bond until after this Court published its opinion affirming the injunction order. Then, for the first time, it filed its motion with the trial court "to vacate, set aside and to declare the preliminary injunction issued herein on February 15, 1956, to be null and void and without effect on the ground that plaintiffs have failed to file the bond required by the decree of this Court and by the law."

Thereupon the plaintiffs filed their bond, which was approved on June 19th by the trial judge. Thereafter, on June 26th, the motion to vacate came on for a hearing and was denied by the trial court. This appeal is from the order of denial.

The appellant here contends that Rule 64(c) of the Federal Rules of Civil Procedure[2] requires the making of the bond as a condition precedent to the becoming effective of the temporary injunction, that since none was made "the preliminary injunction was not in effect or in fact issued during this sixteen months period." From this appellant argues that when thereafter the bond was

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[2] "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

filed this could not cause the injunction to "issue" for the first time. No authorities are cited by appellant in support of this assertion. The School Board relies on cases which hold that a failure of the district court to *make provision* for the issuance of a bond are void. See *Chatz v. Freeman, et al.*, 7 Cir., 204 F. 2d 764.

The appellees take the position that the requirement of security by rule 65(c) was intended to protect a party against damage caused by the wrongful issuance of a temporary injunction, citing *United States v. Onan*, 8 Cir., 190 F. 2d 1, 7; that in this case the injunction order has been affirmed on appeal and it obviously therefore was not erroneously issued; thus appellant could not possibly suffer any damage. They contend that if the failure to file the bond had any effect, it was a mere irregularity which was cured by its subsequent execution. See *Standard Bonded Warehouse Co. v. Cooper*, 4 Cir., 30 F. 2d 842, 845.

Although the point is not raised by appellees, who rest confidently on the merits, we must consider the threshhold question whether the order of the trial court is reviewable. Normally, of course, the Courts of Appeals review only final orders. There is an exception under 28 U.S.C.A. § 1292 as to certain interlocutory orders relating to injunctions. This section provides:

> "The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

Since, obviously, the order which required the making of bond could not be void because of a subsequent failure to make it, the appellant's motion to declare the injunction to be null and void and without effect will be treated as a motion to "dissolve" the injunction. As such the order refusing to do so is appealable.

We have heretofore affirmed the order of the trial court. Thus, no asserted defect in that order can now be considered by us. All we can consider is what transpired subsequent to the entry of the temporary injunction. As we have already pointed out, the injunction required no act on the part of the defendants, and in fact it prohibited no specific act in the sense that the defendants could be found in violation of the order without further definitive injunctive order by the court. The fact that the bond was not executed could not, therefore, conceivably have damaged the defendants. That this is so is eloquently testified to by the failure of the defendant itself to take notice of the omission. The affirmance by this Court of the judgment before defendants sought to have it vacated has settled for all time that defendants have not been, and can never be, "wrongfully enjoined" by the order. The bond was functus officio when made by the plaintiffs. Their failure to make it earlier, when it might have had an office to perform, was waived by the defendant when it let the order stand against it until affirmed on appeal.

Judgment AFFIRMED.